STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

ANGELA FRANCES PACK and BARBARA C. WEINBERG, Independent Personal Representative of the Estates of Merritt N. Hess, Deceased, and Dorothy A. Hess, Deceased,

Defendants-Appellees.

UNPUBLISHED
July 30, 1999

No. 205627
Kalamazoo Circuit Court
LC No. C95-3266-CK

ANGELA FRANCES PACK,

Plaintiff-Appellee,

and

MICHIGAN ATTORNEY GENERAL and MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervenors,

v

WOLVERINE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

No. 205629
Kalamazoo Circuit Court
LC No. A95-3449-CK

Before: Holbrook, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Following a bench trial, the trial court entered a judgment order in which it ruled that a no-fault insurance policy existing between Appellant Wolverine Mutual Insurance Company (Wolverine) and Appellee Angela Pack was "in full force and effect on August 22, 1995, the date Angela Pack was involved in a motor vehicle accident." On the basis of this determination, the trial court ordered that Wolverine was liable for payment of first-party benefits to its insured, Pack, and to provide for the defense of Pack against any third party claims brought by the estates of Merritt Hess and Dorothy Hess. Wolverine appeals as of right. We affirm in part and reverse in part.

I.

On August 22, 1995, a van driven by Pack collided head-on with a van driven by Merritt Hess. Pack sustained serious injuries in the accident and Merritt Hess was killed. Dorothy Hess was injured in the accident and later died. On November 20, 1995, Wolverine filed suit seeking a declaration that it was under no obligation to Pack as a result of the August 22, 1995, accident. In its complaint, Wolverine alleged that Pack's no-fault insurance policy automatically terminated on August 11, 1995. On December 8, 1995, Pack filed suit against Wolverine seeking to enforce a contract of insurance allegedly existing between Pack and Wolverine on the date of the accident. The Michigan Attorney General and the Michigan Department of Community Health (MDCH) intervened in Pack's action to represent the State's interest in recovering the costs of health care paid by MDCH through the medicaid program. The cases were consolidated for trial below and have again been consolidated on appeal.

The basic facts in this case are not seriously in dispute. Pack purchased a no-fault insurance policy from Wolverine for a policy period ending August 11, 1995. The policy contained an "automatic termination" clause, which provided as follows:

> If we offer to renew or continue and you or your representatives do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that you have not accepted our offer.

The policy also contained a "changes" clause, which provided, in part, as follows:

> This policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us. If a change requires a premium adjustment, we will adjust the premium as of the effective date of the change.

Shortly before August 11, 1995, Pack called her independent insurance agent to find out if her policy was going to be canceled. Her agent was not in the office, but the receptionist told her that she had a ten day "grace period" during which she could pay her premium and avoid cancellation. Because she did not completely trust the receptionist's advice, Pack called Wolverine directly to inquire about the so-called "grace period." A Wolverine employee told her that she would be "fine" if she paid her premium by August 25, 1995. Pack testified that, on the basis of her conversation with the Wolverine

employee, she believed she had a "grace period" ending on August 25, 1995, and that she would have continuing insurance coverage if she paid the premium due before August 25, 1995. Wendell DeBruin, Wolverine's vice president of claims, testified that Pack would have been covered on August 22, 1995, if she paid her premium by August 25, 1995. On August 21, 1995, or August 22, 1995, Pack wrote a check to Wolverine in the amount of $100 and placed it in her purse with the intent to mail it on August 22, 1995. She never mailed the check, however, because of the accident.

Pack was hospitalized after the accident. For the first four days of her hospitalization, she was lethargic and somewhat confused due to a closed head injury and the medications she received. Pack's sister, Jackie Dutton, testified that while Pack was drifting in and out of consciousness after the accident she babbled a lot and kept repeating that an insurance check had to be mailed. Pack recalled that when she expressed some concerns regarding her business affairs, her family told her, "Don't worry about it. We've got it all covered." Dutton assumed the responsibility of taking care of Pack's affairs during Pack's hospitalization. She took no action regarding Pack's automobile insurance coverage because on August 23, 1995, Charles Pfister, a claims adjuster hired by Wolverine to work on Pack's case assured her that Pack was "fully covered." Dutton testified that she relied on Pfister's assurance that there was coverage. She further testified that if someone had told her that a premium payment had to be made before August 25, 1995, she would have made the payment. Upon discovering a "past due notice" in Pack's mail, Dutton paid the premium *after* August 25, 1995. Wolverine denied coverage and eventually returned Dutton's check.

After hearing the evidence and the arguments of counsel, the trial court concluded that all of the witnesses had testified credibly. The trial court then ruled that Wolverine should be estopped from denying coverage because the accident occurred during a "grace period" held out by Wolverine, there was reasonable reliance on the claims adjuster's representation that there was coverage, and the "reliance acted to the detriment of the parties because it closed [the] window of opportunity to pay the premium" before August 25, 1995. The trial court also ordered Wolverine to make payments to Pack and MDCH according to the policy and awarded reasonable attorney fees to Pack's counsel upon a finding that Wolverine unreasonably refused to pay Pack's claim.

II.

On appeal, Wolverine first argues that the trial court erred in concluding that Pack was covered. We review a trial court's findings of fact for clear error; its conclusions of law are reviewed de novo. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997).

Relying on *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233; 507 NW2d 741 (1993), Wolverine first contends that its policy issued to Pack terminated on August 11, 1995, pursuant to the "automatic termination" clause. We disagree. Contrary to Wolverine's assertion, the facts in this case are not "identical" to the facts in *McCormic*. In *McCormic*, the insurance company did not take any affirmative action with respect to its insured before the end of the policy period. Here, before the so-called "automatic termination" of Pack's policy, a representative of Wolverine assured Pack that she would be "fine" if she paid her premium by August 25, 1995. Accordingly, *McCormic* is not directly

on point. As noted, the trial court found that Wolverine held out a two-week grace period between August 11, 1995, and August 25, 1995, during which time Pack could pay her premium in order to remain covered. This grace period prevented the contract from automatically terminating on August 11, 1995.

Under the facts of this case, the only possible basis for the trial court's finding that Wolverine held out a grace period was Wolverine's assurance to Pack that she would be "fine" if she paid her premium by August 25, 1995. This assurance was made after Pack called to specifically inquire about a possible "grace period." Although there was no evidence that Pack expressly agreed to pay the premium by August 25, 1995, Wolverine's assurance to Pack that she would be "fine" if she paid the premium before the end of the grace period is made enforceable against Wolverine on a theory of detrimental reliance. A promise is enforceable if the promisor reasonably should have expected it to induce action of a definite and substantial character on the part of the promissee, if the promise did in fact produce reliance or forbearance of that nature, and if the circumstances require that the promise be enforced in order to avoid injustice. See *In re Timko Estate*, 51 Mich App 662, 666; 215 NW2d 750 (1974), cited with apparent approval in *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 370; 320 NW2d 836 (1982); see also *Huhtala v Traveler's Ins Co*, 401 Mich 118, 132 n 16; 257 NW2d 640 (1977), citing Dobbs on Remedies, § 2.3, pp 42-43 (explaining that an estoppel with a promissory element may qualify as a promissory estoppel case in the sense that detrimental reliance on one side will suffice as "consideration"). These elements were present in this case, as Pack's reliance on Wolverine's assurance of a two-week "grace period" induced her to forego acquiring other automobile insurance during the period when the accident occurred.

Wolverine contends that there was no grace period because (1) the contract did not specifically provide for a grace period, and (2) the "changes" clause prohibited the creation of a grace period without a written endorsement. We are not persuaded by Wolverine's contentions. Although the original agreement did not provide for a grace period, this fact does not mean that the parties could not subsequently create one. Moreover, the "changes" clause, by its own terms, applied only to changes and waivers of terms in the original agreement. Here, the grace period held out by Wolverine did not change or waive a term of the original agreement.

Finally, Wolverine contends that the trial court erred in relying on the doctrine of equitable estoppel to create a contractual relationship between Wolverine and Pack where one did not exist. We disagree. As noted, the trial court relied on the doctrine of equitable estoppel when it ruled that Wolverine was estopped from denying coverage on the basis of Pfister's assertion to Dutton that Pack was "fully covered."[1] Although the doctrine of equitable estoppel may operate to prevent a party from enforcing a provision in an existing contract (such as a provision allowing for forfeiture on the breach of a condition), it may not operate to establish a contractual relationship where one does not already exist. See *Morales v Auto-Owners Ins Co*, 458 Mich 288, 298-299; 582 NW2d 776 (1998); *Ruddock v Detroit Life Ins Co*, 209 Mich 638; 177 NW 242 (1920). Such was not the case here. The accident occurred on August 22, 1995, during the two-week grace period. If Pack had paid her premium by August 25, 1995, there is no question that she would have been covered for the accident. Accordingly, the trial court's ruling did not allow the doctrine of equitable estoppel to establish a new contract where

one did not already exist. It merely prevented Wolverine from asserting a forfeiture based on Pack's failure to pay her premium by August 25, 1995. Cf. *Allstate Ins Co v Snarski*, 174 Mich App 148, 157; 435 NW2d 408 (1988) (explaining, on similar facts, that the doctrine of equitable estoppel based on actions of insurer during a grace period did not "create insurance where none existed").

For these reasons, we hold that the trial court did not err in the manner asserted by Wolverine.

III.

Next, relying on *Farmers Ins Exchange v Anderson*, 206 Mich App 214; 520 NW2d 686 (1994), Wolverine argues that coverage for residual liability should be capped at the statutory minimum. We disagree. Contrary to Wolverine's assertion, the situation in this case is not analogous to the situation in *Anderson*, *supra*, because at no time could Pack's policy have been voided *ab initio*.

IV.

Wolverine next argues that the trial court erred in awarding attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). We agree. This Court reviews a trial court's decision to award or deny attorney fees under MCL 500.3148(1); MSA 24.13148(1) for clear error. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 628; 550 NW2d 580 (1996).

The relevant statutory section provides as follows:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1); MSA 24.13148(1)].

The purpose of the section is to ensure prompt payment to the insured. *Beach*, *supra* at 629. When a refusal or delay exists, a rebuttable presumption of unreasonableness arises and the insurer has the burden to justify its refusal or delay. *Id.* If the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or a bona fide factual uncertainty, it will not be found unreasonable. *Id.*

Application of the doctrine of equitable estoppel is a mixed question of law and fact. See *State Bank of Standish v Curry*, 442 Mich 76, 84 n 6; 500 NW2d 104 (1993), quoting *Maxwell v Bay City Bridge Co*, 41 Mich 453, 468; 2 NW 639 (1879). It is undisputed that Pack did not pay her premium when due. In order to prove that Wolverine was bound to accept late payment and provide continuous coverage, she was required to present a sufficient factual record to establish an equitable estoppel. The trial court noted that there was no bona fide factual uncertainty regarding Wolverine's misstatement about Pack's coverage. Wolverine's misstatement, however, was only one of the factual issues necessary to establish an equitable estoppel. Before trial, some of the other issues included whether Pfister was acting as an agent of Wolverine and whether Dutton was justified in relying on Pfister's statements. Although their trial testimony was similar, Pfister and Dutton disagreed on the

extent to which they discussed Pack's coverage during their meetings. Similarly, whether Dutton's reliance was justified also depended on the extent of her knowledge of the status of the relationship between Pack and Wolverine. In this respect, there were unresolved factual questions regarding the extent of Pack's communications with Dutton about the need to pay her premium by August 25, 1995, and the timing of Dutton's discovery of the past due notice. For these reasons, we hold that the trial court clearly erred in awarding attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1).

V.

Finally, Wolverine argues that the mediation evaluation should have been stricken. Because the mediation evaluation had no effect on the outcome below and the prevailing parties failed to file a timely request for mediation sanctions, see MCR 2.403(O)(8), this issue is moot.

VI.

We reverse that portion of the trial court's judgment order awarding attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). The remainder of the trial court's judgment order is affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Pfister's assertion that formed the basis of the estoppel was made to Dutton rather than to Pack, the insured. Wolverine does not challenge the trial court's ruling on the ground that an equitable estoppel may not be based on a representation to a third party. Accordingly, we need not consider the issue. See *Detroit Automobile Inter-Insurance Exchange v Comm'r of Ins*, 125 Mich App 702, 713; 336 NW2d 860 (1983) ("Under Michigan practice, the parties to the case have control over the issues and this Court need address only the issues raised by them."). In any event, we see no reason why, under the unique circumstances of this case, Pfister's representation to Dutton, that was relied on by Dutton, and predictably resulted in prejudice to Pack, should not form the basis of an equitable estoppel.